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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

BEN BURTON,

Defendant and Appellant.

D060824

(Super. Ct. No. SCS247109)

APPEAL from a judgment of the Superior Court of San Diego County, Kathleen M. Lewis, Judge. Affirmed.

Ben Burton pled guilty to false imprisonment and admitted a strike prior conviction. The court sentenced him to prison and ordered him to pay restitution to the victim. On appeal, he contends the court erred in refusing his request for a restitution hearing distinct from the sentencing hearing. We reject this contention and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND¹

The events giving rise to the charged offenses occurred during a three-day period at Burton's residence after Burton and his girlfriend (M.G.) engaged in an argument over her seeing a male friend. On Friday, March 25, 2011, Burton pushed M.G. into a closet door, which broke the door, and he pushed her to the bathroom floor, causing her to hit the floor and her back to arch over the edge of the bathtub. M.G. stayed the weekend at Burton's residence because she was too intimidated to leave. During an attempt to leave, she picked up her shoes and Burton kicked her three times in the buttocks and vagina. Burton then told her to remove her clothes and to orally copulate him. She did this, and he had sexual intercourse with her. M.G. complied with his sexual demands because she was afraid he would hit her again.

M.G. was finally able to leave Burton's residence on Monday, March 28, 2011. She went to her mother's residence and then to the hospital. She suffered bruises under her left eye, and on her shoulders, ribs, and lower back.

Burton was charged with assault by means of force likely to produce great bodily injury, making a criminal threat, and false imprisonment by violence, menace, fraud or deceit, with prior prison term and strike allegations. He pled guilty to the false imprisonment charge and admitted the strike prior. He was sentenced to two years eight months in prison. He was ordered to pay restitution, including \$10,099.34 to the victim to compensate her for her medical expenses.

¹ Because Burton pled guilty, our factual summary is derived from the probation report.

DISCUSSION

Burton argues the trial court abused its discretion and violated his due process rights by refusing his request for a separate restitution hearing after the sentencing hearing.

Background

The probation report included the following information relevant to the victim's medical expenses. The victim and Burton had been in a relationship for about three months, and there was one incident of previous domestic violence prior to the charged incident. After the charged incident, the victim left defendant's residence and went to her mother's residence. She suffered "bruises on her ribs, back and shoulder, and left eye area" and she "had to go to the hospital for her injuries." Her mother drove her to the hospital. She requested "restitution in the amount of \$9,000.00 for her emergency room bills."

At sentencing, the prosecution presented two documents to show the victim's economic losses from the incident. These documents are not included in the appellate record; however, they are described in the record by the trial court. According to the trial court's description, one document was a letter from Sharp Hospital to the victim stating that there was a "balance due" of \$8,962.50 for emergency procedures on March 28. The second document was a "late notice" from American Medical Response for \$1,136.84 for ambulance services. The court reviewed the documents and stated that they constituted sufficient proof by a preponderance of the evidence to set the amount of victim restitution at \$10,099.34.

Defense counsel objected and requested that the court set a separate restitution hearing. Defense counsel stated that she would like the opportunity to subpoena the victim (who was not present at the hearing), and that Burton had "a very long story" to present to the court that necessitated a longer hearing. Defense counsel explained that she did not believe the victim's injuries were all sustained from her encounter with Burton, and that there were "many indications that [the victim] had been injured before." Defense counsel acknowledged that "the court could find the documents themselves seem to be sufficient," but stated there was a "a long history in this case with many developments and issues that . . . cannot be captured in a short hearing"

The court rejected defense counsel's request for a separate restitution hearing. The court stated that the probation report showed the victim went to the hospital for the injuries she had suffered from the assault, and the two documents provided by the prosecution "clearly show that on the dates involved" the victim incurred medical expenses in the amounts indicated by the court. The court also commented that the victim and Burton had been in a relationship for three months, and if the victim had any prior injuries, the court would not "doubt that those prior injuries were also the result of that type" of action.

General Law

The trial court is required to award restitution to a victim who has suffered economic loss as a result of the defendant's conduct. (Pen. Code, § 1202.4, subd. (f).)² The restitution order shall be "sufficient to fully reimburse the victim or victims for every

² Subsequent statutory references are to the Penal Code.

determined economic loss incurred as the result of the defendant's criminal conduct" (§ 1202.4, subd. (f)(3).) The restitution amount should be "based on the amount of loss claimed by the victim or victims or any other showing to the court." (§ 1202.4, subd. (f).) To comport with basic due process, a defendant must be given notice and the opportunity to be heard. (*Koshak v. Malek* (2011) 200 Cal.App.4th 1540, 1547.) Consistent with this dictate, the victim restitution statutory scheme provides that the defendant has the right to a restitution hearing "to dispute the determination of the amount of restitution." (§ 1202.4, subd. (f)(1).) The statute contemplates that the restitution amount will be determined at sentencing, unless the amount cannot be ascertained at that time. (§ 1202.4, subd. (f); see *People v. Holmberg* (2011) 195 Cal.App.4th 1310, 1319.)³ The defendant's right to notice and a hearing is protected if the amount claimed by the victim is set forth in the probation report, and the defendant has an opportunity to challenge the figures in the probation report at the sentencing hearing. (*People v. Cain* (2000) 82 Cal.App.4th 81, 86; see *People v. Gonzalez* (2003) 31 Cal.4th 745, 754.)

If the defendant objects to the amount of victim restitution set forth in the probation report, the prosecution is required to support the amount by a preponderance of the evidence. (See *People v. Brasure* (2008) 42 Cal.4th 1037, 1074-1075; *People v. Holmberg*, *supra*, 195 Cal.App.4th at pp. 1319-1320.) Once the prosecution has made a prima facie showing to support the amount of loss, the burden shifts to the defendant to

³ Section 1202.4, subdivision (f) states in part: "If the amount of loss cannot be ascertained at the time of sentencing, the restitution order shall include a provision that the amount shall be determined at the direction of the court."

demonstrate that the amount is other than that claimed by the victim. (*People v. Millard* (2009) 175 Cal.App.4th 7, 26.)

On appeal, we review the trial court's restitution order for abuse of discretion. (*People v. Giordano* (2007) 42 Cal.4th 644, 663.) We draw all reasonable inferences in favor of the court's order, and affirm if there is substantial evidence to support it. (*Id.* at p. 666; *People v. Millard, supra*, 175 Cal.App.4th at p. 26.) The statute does not require "any particular kind of proof" and "[n]o abuse of discretion will be found where there is a rational and factual basis for the amount of restitution ordered." (*People v. Gemelli* (2008) 161 Cal.App.4th 1539, 1542-1543.)

Analysis

Preliminarily, to the extent Burton asserts that the trial court erred because he was not afforded a restitution hearing *at all*, the contention fails. The record shows he was afforded a restitution hearing in conjunction with the sentencing hearing, which comports with the statutory scheme. (§ 1202.4, subd. (f); see *People v. Holmberg, supra*, 195 Cal.App.4th at p. 1319.) Thus, the question before us is whether the court abused its discretion in not granting a *continued* restitution hearing to allow for the presentation of additional evidence. To review this claim, we evaluate Burton's contentions concerning the two expense items (emergency room services and ambulance services) that comprise the restitution order.

Emergency Room Expenses

Burton argues the court should have granted his request for a separate restitution hearing based on his claim that the emergency medical treatment at the hospital was attributable to the victim's preexisting injuries, not to the injuries he inflicted.

Generally, a criminal wrongdoer, like a tortfeasor, " 'takes his victim as he finds him.' "

(*People v. Taylor* (2011) 197 Cal.App.4th 757, 764; *People v. Cameron* (1975) 53

Cal.App.3d 786, 789-790.) Thus, a defendant is liable for loss arising from his conduct

even if "by reason of some preexisting condition, his victim is more susceptible to

injury" (*Rideau v. Los Angeles Transit Lines* (1954) 124 Cal.App.2d 466, 471.)

Thus, to the extent Burton is asserting that he had the right to present evidence to show

that the victim received emergency medical treatment for preexisting injuries that were

aggravated by his assaultive conduct, the contention is unavailing.⁴

Further, to obtain an additional restitution hearing, defense counsel was required

to make an offer of proof demonstrating that there was material evidence warranting

further hearing. (See *People v. Riggs* (2008) 44 Cal.4th 248, 296-297; *People v. Beeler*

(1995) 9 Cal.4th 953, 1003.) Defense counsel did not proffer any information suggesting

that Burton's conduct was not the cause of the emergency room medical expenses

claimed by the victim. Causation is established if the defendant's conduct was a

⁴ We note that in *People v. Cain*, *supra*, 82 Cal.App.4th at page 87, the court stated that the defendant had the right to challenge a restitution award for psychotherapy based on a claim that the victim was undergoing the psychotherapy for preexisting reasons unrelated to his criminal conduct. There is nothing in *Cain* which undermines the general principle that a defendant is liable for losses caused by the criminal conduct even if the losses include exacerbation of a preexisting injury.

substantial factor in bringing about the loss. (*People v. Holmberg, supra*, 195 Cal.App.4th at pp. 1321-1322.) The evidence before the court showed that the victim was injured by Burton; that she went to the emergency room for treatment of these injuries; and that she owed the hospital money for this treatment. Defense counsel's general assertions that the victim had been injured before and that Burton had a "long story" to tell did not provide the court with any information suggesting that Burton's conduct did not cause the need for the victim to be treated at the hospital. For example, defense counsel did *not* proffer that the victim went to the hospital and obtained treatment due to an incident and injury that was unrelated to defendant's conduct.

To support his argument, Burton notes that the court posited that he was the likely cause of any preexisting injuries suffered by the victim. Burton asserts that this speculative comment cannot provide evidentiary support for the restitution order. Given our conclusions above, we need not evaluate this contention. Even if Burton did not cause any preexisting injuries, he was responsible for his conduct aggravating the injuries, and he made no offer of proof that the expenses were incurred for reasons apart from the injuries he inflicted.

Burton further asserts that the emergency room bill may ultimately have been discounted so that the victim actually owed less money (see *People v. Millard, supra*, 175 Cal.App.4th at pp. 27-29; *People v. Duong* (2010) 180 Cal.App.4th 1533, 1539-1540), and his counsel should have been allowed to explore this issue at a continued restitution hearing. Generally, to preserve a restitution issue for appellate review, the defendant must raise the objection to the trial court. (*People v. Gonzalez, supra*, 31 Cal.4th at p.

755; *People v. Whisenand* (1995) 37 Cal.App.4th 1383, 1395-1396; *In re S.S.* (1995) 37 Cal.App.4th 543, 547-548.) Defense counsel did not raise the possibility of a discounted bill when requesting an additional restitution hearing. The prosecution's presentation of documentary evidence showing a "balance due" of \$8,962.50 for emergency treatment was sufficient to create a prima facie showing that the victim owed this money. (See *In re K.F.* (2009) 173 Cal.App.4th 655, 663-664.) Defense counsel had notice from the probation report that the victim was claiming \$9,000 restitution for her emergency room bills, and any challenges to this amount should have been presented to the trial court. Because the discount-billing issue was not mentioned to the trial court, Burton cannot rely on this matter to support his claim that the court erred in denying his request for a separate hearing.

Ambulance Expenses

To support his challenge to the court's refusal to grant him an additional hearing, Burton also cites the fact that the probation report states the victim's mother drove her to the hospital, and there was no mention of ambulance use prior to the sentencing hearing. Although the record shows a lack of notice and a discrepancy in the probation report concerning the ambulance expense, we conclude that this issue is forfeited on appeal because Burton's counsel did not complain about this matter to the trial court notwithstanding a full opportunity to do so. Further, even if we review the matter for ineffective representation, on this record there is no showing of prejudice.

At the sentencing/restitution hearing, the court described the two documents (including the document referring to the ambulance services) as "clearly show[ing] that

on the dates involved" the expenses were incurred. Defense counsel made no objection that an ambulance expense was not incurred when the victim went to the hospital due to Burton's assault. To the contrary, the record supports that defense counsel saw no basis to challenge the applicability of the ambulance expense. At the commencement of the hearing, defense counsel stated that "apparently there were some documents," but that Burton was not prepared to stipulate to an amount of restitution because the defense "need[ed] to review any documentation." However, after the court reviewed and summarized the documents on the record, defense counsel stated: "I understand the court could find the documents themselves seem to be sufficient" By acknowledging the sufficiency of the documents, defense counsel implicitly conceded that they correlated with the criminal incident, and she focused her request for an additional restitution hearing solely on the preexisting injury claim.

To avoid a forfeiture on appeal, the defendant must generally raise restitution objections (including those based on lack of notice) to the trial court. (*People v. Gonzalez, supra*, 31 Cal.4th at p. 755; *People v. Whisenand, supra*, 37 Cal.App.4th at pp. 1395-1396.) This principle applies here. If defense counsel had objected based on the omission and discrepancy in the probation report concerning the ambulance services, the court could have taken measures to ensure that the matter was clarified.

Further, this is not a case where the court summarily imposed restitution in excess of the amount in the probation report without providing the defendant an opportunity to challenge the amount. (See, e.g., *People v. Resendez* (1993) 12 Cal.App.4th 98, 111-114, & fn. 11 [reversal required due to lack of notice and no opportunity to object to

restitution award].) Here, the parties and court discussed the appropriate amount of restitution; the court explicitly asked defense counsel to explain why she objected to the prosecution's claimed amounts; and defense counsel made no argument pertaining to the claimed ambulance services. Because defense counsel had the opportunity to raise an objection concerning the ambulance expense but did not do so, the issue is forfeited on appeal. (See *People v. Gonzalez, supra*, 31 Cal.4th at pp. 749-750, 755 [challenge based on imposition of victim restitution (which was not mentioned in probation report) forfeited on appeal due to failure to object on this ground before trial court].)

Although Burton does not raise an issue of ineffective representation based on his counsel's failure to specifically object to the ambulance expense, even if we consider such a claim, there is no basis for reversal on this record. To show ineffective representation, the defendant must establish that counsel's performance fell below an objective standard of reasonableness, and there is a reasonable probability that absent counsel's deficiency the result would have been different. (*People v. Weaver* (2001) 26 Cal.4th 876, 925.) If the record does not show prejudice from counsel's alleged deficiency, we may reject the claim without determining whether counsel's performance was deficient. (*People v. Sapp* (2003) 31 Cal.4th 240, 263.)

Despite the statement in the probation report indicating that the victim's mother drove her to the hospital, the trial court was presented with a documentary item showing that the victim incurred an ambulance expense. After reviewing the document, the trial court was satisfied the ambulance expense was tied to the injuries incurred from Burton's assault. Likewise, the record supports that defense counsel reached the same conclusion,

as shown by her statement acknowledging that the documents were sufficient evidence to support the claimed expenses. Because the actual ambulance-expense document is not included in the appellate record, we cannot independently examine it and instead rely on the court's and counsel's assessments of its applicability to the charged incident. On this record, Burton has not shown a reasonable probability that the victim did not incur an ambulance expense because of his crime.

DISPOSITION

The judgment is affirmed.

HALLER, J.

WE CONCUR:

HUFFMAN, Acting P. J.

NARES, J.